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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

**VICKY M. LOPEZ, CRESCENCIO PADILLA,
WILLIAM A. MELENDEZ, and DAVID SERENA, *Appellants*,**

v.

**MONTEREY COUNTY, CALIFORNIA,
STATE OF CALIFORNIA, *Appellees*,**

and

STEPHEN A. SILLMAN, *Intervenor-Appellee*

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**APPELLANTS' REPLY IN OPPOSITION
TO MOTION TO DISMISS OR AFFIRM
OF INTERVENOR-APPELLEE STEPHEN A. SILLMAN**

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	8

TABLE OF AUTHORITIES

Cases

<i>Clark v. Roemer</i> , 500 U.S. 646, 111 S.Ct. 2096 (1991)	3
<i>Cowgill v. California</i> , 396 U.S. 371, 90 S.Ct. 613 (1970)	4
<i>Minnick v. California Dept. of Corrections</i> , 452 U.S. 105, 101 S.Ct. 2211 (1981)	3, 4
<i>Rescue Army v. Municipal Court</i> , 331 U.S. 549, 67 S.Ct. 1409 (1947)	4
<i>Socialist Labor Party v. Gilligan</i> , 406 U.S. 583, 92 S.Ct. 1716 (1972)	3
<i>United States v. Bd. of Com'rs of Sheffield, Ala.</i> , 435 U.S. 110, 98 S.Ct. 965 (1978)	3
<i>Upham v. Seamon</i> , 456 U.S. 37, 41 - 42, 102 S.Ct. 1518, 1521 (1982)	6
<i>Wilkes County, Georgia v. United States</i> , 450 F.Supp. 1171 (D.D.C. 1978), <i>aff'd. mem.</i> , 439 U.S. 999, 99 S.Ct. 606 (1978)	6, 7

Statutes

42 U.S.C. § 1973c	<i>passim</i>
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The Motion to Dismiss or Affirm filed by Intervenor-Appellee Stephen A. Sillman contains basically the same arguments advanced by the State of California in its Motion to Dismiss or Affirm. Appellants will briefly respond to the major points addressed by Intervenor-Appellee's Motion.

The Intervenor-Appellee argues that until there is a final

resolution of the merits of this Section 5 action, 42 U.S.C. § 1973c, there should be no injunctive relief granted to enjoin the at-large judicial election. This argument discounts the primary issue involved in this appeal.

This appeal seeks to prevent the implementation of a voting change which has not received the requisite Section 5 preclearance. There can be no serious dispute that Monterey County is a jurisdiction subject to Section 5.¹ There can also be no serious dispute that the at-large method of election for municipal court judges has not been approved pursuant to Section 5.² Under applicable Section 5 precedent, the Appellants are entitled to an order preventing the implementation of the unprecleared at-large election scheme. See App. Opp. to Calif. Mot. at 2.

The fact that there are unresolved legal issues does not diminish the clearly established right of Appellants to an order enjoining the unprecleared at-large election scheme. The Intervenor-Appellee speculates that if the State prevails in its arguments that this Section 5 action may be dismissed. However, the Appellants can equally speculate that the State's arguments will not prevail. In any event, denying injunctive relief now, pending resolution of these

¹ As noted in the opposition to the State's Motion to Dismiss or Affirm, the State's contention that the designation of Monterey County as a Section 5 covered jurisdiction is susceptible to constitutional challenge is the wrong argument in the wrong court. See App. Opp. to Calif. Mot. at 5.

² Both the State of California and the Intervenor-Appellee consistently ignore that the United States Attorney General in an administrative determination dated November 13, 1995, concluded that the at-large method of electing municipal court judges has not been submitted for preclearance and thus, has not received the requisite Section 5 preclearance. Appellants' J.S. at pp. 9 - 10.

issues, would undermine the very purpose of Section 5, which seeks to shift "... the advantages of time and inertia from the perpetrators of the evil to its victims." *United States v. Bd. of Com'rs of Sheffield, Ala.*, 435 U.S. 110, 121, 98 S.Ct. 965, 974 (1978).

The Intervenor-Appellee cites several cases to support his argument that the appeal should be dismissed because the legal issues have not been fully developed in the trial court proceedings. These cases are clearly distinguishable. In *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 92 S.Ct. 1716 (1972), revisions in the state's election code had rendered moot most of the challenges regarding minority party ballot access. The only remaining challenge related to a loyalty oath required of political parties. This issue had not been developed in the District Court proceedings. Moreover, since the Court had noted that members of the political party had previously signed the oath and that members had secured a place on the ballot, there was difficulty in demonstrating any injury to the political party as the record was presented to this Court. For these reasons, the appeal was dismissed even though jurisdiction was technically present.

In sharp contrast to *Socialist Labor Party*, the appeal in this Section 5 action presents a clear violation of the Voting Rights Act. The harm to the Appellants is that they will be forced to participate in an at-large judicial election which has not received Section 5 preclearance. *Clark v. Roemer*, 500 U.S. 646, 111 S.Ct. 2096 (1991). In this Section 5 action, the issue remains decidedly ripe.

Another case cited by the Intervenor-Appellee, *Minnick v. California Dept. of Corrections*, 452 U.S. 105, 101 S.Ct. 2211 (1981), involved an action filed in state court challenging the application of an affirmative action plan. Review of a state court's decision was sought by a writ of certiorari. The Court dismissed the writ because of significant developments in the law and in the facts which did not warrant this Court's review until those issues had been fully adjudicated in the trial and appellate courts.

Minnick is inapplicable to this Section 5 action. The *Minnick* Court's decision to dismiss the writ was based upon its determination that the federal question might have been affected by additional proceedings in the lower court. In contrast, no additional proceedings in the District Court here are necessary. For purposes of this appeal, there are no additional legal or factual issues to examine, since Monterey County is subject to Section 5 and the at-large election method of electing municipal court judges has not received the required Section 5 approval. Under applicable Section 5 precedent, this Court should reverse the District Court's decision to implement an unprecleared voting change.

For the same reasons articulated above, the Court's dismissal of appeals in *Cowgill v. California*, 396 U.S. 371, 90 S.Ct. 613 (1970), and in *Rescue Army v. Municipal Court*, 331 U.S. 549, 67 S.Ct. 1409 (1947) are also distinguishable. Unlike those cases, there is no need in this Section 5 action to await the construction of state laws and ordinances by state courts or to await the outcome of any state court proceedings. The Court has all the relevant facts to decide whether the District Court erred as a matter of law in implementing an unprecleared voting change contrary to this Court's Section 5 precedent.

Contrary to the assertions of Intervenor-Appellee, the reversal of the District Court's November 1, 1995, Order, will not result in the restructuring of the County's judicial system. The only consequence of a reversal of the District Court's Order is that an at-large election scheme would not be used in municipal court elections. The District Court would be free to use any other election plan so long as it complies with the standards for court-ordered election plans.³

³ There is no dispute that at a minimum, whatever benchmark is ultimately utilized, a court-ordered plan in a Section 5 action must not result in a retrogression of minority voting strength. See App. Opp. to Calif. Mot. to at p. 9.

Alternatively, the District Court could simply extend the terms of those judges elected in the June 6, 1995, precleared special election until all of the legal issues raised by the State are resolved.

The Intervenor-Appellee opposes the extension of judicial terms because he contends that the temporary judicial division plan utilized in the June 6, 1995, special election is unconstitutional. Appellants dispute this contention. First, the District Court has not made a finding of unconstitutionality. Second, the District Court did not conduct an evidentiary hearing to determine whether race was in fact the only factor incorporated in the formulation of the judicial division election plan and to determine whether the use of race-based criteria was necessary to further a compelling state interest.⁴ Absent a finding of unconstitutionality, the District Court does have the judicial discretion to extend the terms of those judges elected pursuant to the June 6, 1995, election plan until the State and Monterey County can adopt and implement a judicial election plan which meets both state constitutional and federal statutory requirements. Such an extension of terms would not disrupt the administration of justice in Monterey County.⁵

⁴ The Intervenor-Appellee states that a hearing on the constitutionality of the June 6, 1995, judicial division election plan was conducted on September 28, 1995. Intervenor-Appellee Motion to Dismiss or Affirm, at pp. 18 - 19, n. 14. The Intervenor-Appellee, however, neglects to mention that the hearing on September 28, 1995, was not an evidentiary hearing where the parties could present evidence to determine whether race was the sole factor in formulating the June 6, 1995, election plan and, if so, whether the election plan furthered a compelling state interest.

⁵ There have been no allegations that the municipal court judges elected in the June 6, 1995, cannot continue to administer justice while the District Court adjudicates all of the State's legal issues.

The Intervenor-Appellee also argues that this Section 5 action presents extreme circumstances justifying the use of an unprecleared at-large election system. The Intervenor-Appellee suggests that the District Court did not have any alternative other than to implement the unprecleared at-large election plan. The Intervenor-Appellee notes that a return to the 1968 judicial election plan is unfeasible because such a return would require a restructuring of the County's judicial system. And the extension of judicial terms of those judges elected pursuant to the June 6, 1995, election plan is not favored because of the plan's alleged unconstitutionality. Even accepting *arguendo* that the extension of judicial terms was not viable, the District Court did have a third alternative: the implementation of a court-ordered plan which fairly reflected the voting strength of the minority community, *Wilkes County, Georgia v. United States*, 450 F.Supp. 1171, 1176 (D.D.C. 1978), *aff'd. mem.*, 439 U.S. 999, 99 S.Ct. 606 (1978), and which did not result in a retrogression of minority voting strength. Since the election plan in place in 1968 consisted of judicial election districts, the fairly drawn plan would also have to consist of districts. This is so because the 1968 plan was reflective of the State's policy preferences, which are not the subject of any judicial challenge.⁶

The Intervenor-Appellee further argues that the absence of any retrogression benchmark constitutes an additional extreme circumstance justifying the use of an unprecleared at-large election plan. However, as noted above, even assuming that there is not an

⁶ In formulating a court-ordered plan, a federal court will defer to such policy preferences. *Upham v. Seamon*, 456 U.S. 37, 41 - 42, 102 S.Ct. 1518, 1521 (1982). Accordingly, the fairly drawn election plan would also have to consist of similar districts. Given the minority concentrations in Monterey County, Appellants' J.S. at pp. 3 - 4, such an election plan would contain at least two predominantly minority judicial districts. Compared to this district plan, the at-large election system must be viewed as a retrogression of minority voting strength.

appropriate benchmark, the District Court must develop the benchmark in accordance with *Wilkes County*. The fact that there has been no finding of retrogression with respect to the county ordinances is not a bar to the District Court's authority to implement a court-ordered plan which uses an election plan developed pursuant to *Wilkes County* as a benchmark. The absence of such a retrogression finding, however, is highly relevant to the issuance of injunctive relief preventing the use of an unprecleared voting change. The Intervenor-Appellee misunderstands the operation of the Section 5 preclearance provisions. Section 5 requires Monterey County and the State of California to first seek approval of changes affecting voting before these changes are implemented. The absence of a retrogression finding, in the context of this Section 5 action, clearly indicates that no Section 5 approval has been obtained. Absent such approval, the voting change must be enjoined.

In summary, all of the arguments presented by the Intervenor-Appellee do not address the clear violation of the Section 5 preclearance procedures caused by the District Court's decision to implement an unprecleared election plan. Accordingly, the Court should apply its Section 5 precedent and protect the rights of minority voters under the Voting Rights Act.

Conclusion

For the reasons stated above, the arguments presented by the Intervenor-Appellee are completely without merit. The Motion to Dismiss or Affirm filed by the Intervenor-Appellee should be denied.

Dated: March 8, 1996.

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